NO. 20185

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT HOOPES and RAE S. HOOPES,	)
Appellants,	)
vs.	)
UNION OIL COMPANY OF CALIFORNIA, a corporation,	)
Appellee.	)

BRIEF OF APPELLEE

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SUBJECT INDEX

A. Whether appellants as lessors of a service station, receiving a fixed monthly rental, have standing to sue under Sections 1 and 2 of the Sherman Act, 15 U.S.C. Sections 1 and 2, for loss of rent income and reduced

market value of their leased service station resulting when the lessee-operator failed financially and abandoned the station allegedly due to the onerous provisions of an illegal requirements contract in restraint of trade between the lessee-operator and Appellee Union Oil, the gasoline supplier.

B. Whether appellants as lessors of a service station state a cause of action for price discrimination under the Robinson-Patman Act, 15 U.S.C. Section 13, when they were not at any time relevant to this case operators of the service station and were never either purchasers of products from or competitors of the alleged discriminator, Union Oil.

C. Whether an action commenced January 18, 1963, under the anti-trust laws by a contract vendor and later lessor of a service station for damages arising out of an alleged contract in restraint of trade is barred by the four year anti-trust statute of limitations, 15 U.S.C. Section 15b, when the last overt act in completing the alleged contract in restraint of trade occurred on December 21, 1955, more than

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I.

STATEMENT OF JURISDICTION AND PLEADINGS

A. Jurisdiction of Trial Court.

The Trial Court had original jurisdiction of appellants First Cause of Action (R.1-18, 119) under the provisions of 15 U.S.C. §15, based upon their allegation of violations of 15 U.S.C. §§ 1 & 2 and 15 U.S.C. § 13 as specifically re-reffered to in appellants' Amendment to their First Cause of Action (R.119).

B. Jurisdiction of this Court.

This Court has jurisdiction under 28 U.S.C. § 1291 of the Appeal from the Partial Summary Judgment of the Trial Court (R.205-6) in favor of Appellee Union Oil dismissing appellants' first cause of action. The Trial Court expressly determined pursuant to Rule 54 (b), F.R. Civ. P., that there was no just reason for delay in entry of Final Partial Summary Judgment (R.201-2).

C. Summary of Pleadings.

Appellants have alleged certain anti-trust violations in their first cause of action (R.1-18) as well as allegations of tortious interference with their property in their second

and third causes of action (R.18-21) against Appellee Union Oil Company of California. After the conclusion of lengthy pre-trial proceedings, covering a period of two years and four months, Appellants' first cause of action was dismissed by the District Court (R197-200, 205-6) upon Union Oil's Motion for Partial Summary Judgment (R.187-93). Appellants' second and third causes of action are not in issue in this appeal.

II.

COUNTER-STATEMENT OF THE CASE

Appellee Union Oil is restating the Statement of the Case pursuant to Subparagraph 3 of Rule 18 of the Amended Rules of the Ninth Circuit because it does not feel that the appellants have adequately stated the case in their opening brief.

A. Earlier Litigation Between the Parties.

This action was commenced by plaintiff-appellants Robert Hoopes and Rae S. Hoopes against defendant-appellee Union Oil Company of California on January 18,

1963 (R.1) subsequent to and as a direct outgrowth of earlier litigation between the same parties in the Superior Court of the State of Alaska for the Fourth Judicial District.

In that earlier proceeding, by a Judgment entered April 11, 1962 (R.24), the Alaska Superior Court dismissed Union Oil's complaint against the appellants in this proceeding wherein it sought leasehold possession of a gasoline service station owned by Robert Hoopes and damages. The Alaska Superior Court also dismissed Hoopes' counter-claim for damages against Union Oil.

The District Court below in its Pre-Trial Order (R.114-18) determined that the issues of fact and law as stated by the Alaska Superior Court in its Findings of Fact 2 through 31 (R.26-36), Conclusions of Law 2 through 6 and 13 (R.37-9), and the Memorandum Opinion of Judge Rabinowitz (R.63-90) as incorporated in the Findings and Conclusions, were conclusively established in this proceeding.

B. Description of Parties

Appellants are owners of a gasoline service sta-

tion site and facilities in Fairbanks, Alaska (R.5). During the period relevant to this case, the service station was operated either by a contract purchaser from appellants or by a lessee from appellants and was never operated by appellants themselves (R.5-9, 12, 31, 33-4).

Appellee is a California corporation engaged in the business of producing, refining and marketing petroleum products in the Western portion of the United States (R.2, 133-4) and sold its products in Fairbanks, Alaska to the operators of appellants' service station (R.9-12). At no time relevant to this case did appellants purchase any of appellee's products (R.215).

C. Transactions between Appellant Robert Hoopes, the Station Operators and Appellee Union Oil Company

The Findings (R.26-36) and Conclusions (R.37-9) and the Memorandum Opinion (R.63-90) of Judge Rabinowitz of the Alaska Superior Court, along with the allegations of Plaintiff's Complaint, (R.1-18) describe in detail certain transactions which form the basis for appellants'

anti-trust claims as delineated in the Pre-Trial Order of the District Court (R.114-18) and which for the purpose of this appeal are either binding upon the parties or must be deemed to be true in reviewing the propriety of the entry of Summary Judgment.

From 1945 until March, 1951, appellants were the owner-operators of the service station in issue and purchased gasoline from appellee Union Oil (R.66-8). From March, 1951 to December 21, 1955, appellants leased the service station to Victor Hart who continued to purchase gasoline from Union Oil (R.28, 68). No claims are made by appellants against Union Oil relating to this period from 1945 to December 21, 1955.

On December 21, 1955, at the conclusion of various discussions between Robert Hoopes, Victor Hart and Union Oil officials, a series of documents was executed. The appellants Hoopes as owners, sold the service station site and facilities under contract to Victor Hart for $125,000, upon the down payment of $25,000 and the balance payable in monthly instalments, with title to be retained in appellants until the full purchase price was

paid (R.6, 31-2 , 76).

On that same date Union Oil leased the premises from Victor Hart with appellants' consent for a period of fourteen years at a rental of one and one-half cents for all gasoline purchased by Hart from Union Oil with a guaranteed minimum rental of $217.70 (R.6-7, 32, 71-2). Simultaneously, the premises were leased back by Union Oil to Hart for the same period of fourteen years for the rental of one and one-half cents for all gasoline purchased by Hart "whether purchased from Union Oil or not" and containing a provision authorizing Union Oil to terminate the lease-back on seven days' notice (R.7, 32, 73). Although there was no express written commitment by Union Oil to do so, Union Oil verbally agreed to give Hart as the station operator a one cent per gallon discount (R.7, 32), which appellants had specifically requested on behalf of Hart (R.29).

Appellants allege the discount was not allowed to other operators and was "arbitrarily discontinued and not allowed to Victor Hart's successors" at the service

station in issue (R.8).

Hart then mortgaged the real property and chattels to the Seattle-First National Bank to secure a loan issued by the bank for the $25,000 purchase price down payment. The appellants received the net proceeds from this loan. The loan was to be repaid by Hart's authorizing Union Oil to pay the bank directly the one and one-half cent per gallon rental payable by Union to Hart (R. 8, 32-3, 74-6).

Victor Hart operated the service station until February 10, 1956, when he subleased the premises with Union Oil's consent to Schroeder & Wisel, who operated the station for approximately one year (R.12, 33-4, 77), when they together with Hart incorporated as Transfare, Inc., which, again with Union's consent, proceeded to operate the station until May, 1958 (R.34). These successors to Hart continued to purchase Union Oil gasoline under the contractual arrangements executed by Victor Hart (R.12, 33-4, 77).

On May 18, 1958, Hart and Transfare quitclaimed their interest in the premises back to appellants who immediately leased the station to Transfare for a five

year term for a fixed rental of $875 per month (R.34, 77).

Upon the protest of appellants, Transfare, which had deducted from its payment of rent to appellants the amount of rent payable to Union Oil, in July, 1958 discontinued paying any further rent to Union Oil, whereupon Union Oil gave notice of default under the leaseback agreement and of its intention to claim possession of the station and to operate the premises itself (R.13, 34,77). Union Oil continued making the monthly payments due the Seattle-First National Bank under Hart's purchase loan, although no rentals were paid Union Oil and it did not have possession of the premises (R.34-5, 77-8).

Judge Rabinowitz in his Findings and Conclusions determined that Union Oil was not entitled to possession or damages for the reason that by the lease agreement between Victor Hart as owner (contract vendee)-operator and Union Oil, and as consented to by the appellants as contract vendors, -

> "[Union Oil] was not at any time, pertinent herein, entitled to possession of all or a portion of the subject premises and, therefore, defendants [Hoopes] did not reach any agreement with the plaintiff [Union Oil]

> by their failure to surrender possession when so demanded by plaintiff. What we do find is a requirements contract which purported to bind Hart [not Hoopes]... to purchase Union's gasoline for sale from the subject premises." (R.79, see also R. 35-6).

Judge Rabinowitz further determined that Robert Hoopes was not obligated by his consent to the lease-leaseback agreement to pay rent when Hart defaulted on the leaseback and accordingly Union Oil's claim for damages was also denied (R.85-6, 88).

Judge Rabinowitz also considered the Hoopes' affirmative defense that the "requirements contract" violated §§ 1 and 2 of the Sherman Act and § 3 of the Clayton Act and was therefore unenforcible, and concluded:

> "11. Defendants [Hoopes] have failed to sustain their burden of proof with regard to allegations contained in their seventh affirmative defense pertaining to violations of the Sherman Act and of the Clayton Act." (R.39).

> "...The Court concludes that defendants have not established that performance of [the lease-leaseback and related documents] would probably foreclose competition in a substantial line of the commerce affected throughout the area of effective competition. Since the Court does not find a violation of § 3 of the Clayton Act, determination of the issues raised under §§ 1 and 2 of the Sherman Act become un-

> necessary. (Tampa Electric Co. v. Nashville Co.) [365 U.S. 320 (1961)] p. 335. ... There is no issue as to a Robinson-Patman Act violation ... Further, note that no issue was raised as to common law illegal restraint". (R.90).

However, Judge Hodge in his Pre-Trial Order ruled that the doctrine of collateral estoppel does not apply to the anti-trust Finding of Fact No. 32 (R.36-7) and Conclusion of Law 11 (R.39) of Judge Rabinowitz for the reason that they were not essential to the judgment dismissing Union Oil's complaint in that proceeding (R.109-111).

Subsequent to the Alaska Superior Court litigation appellants allege that Union Oil continued to make claims that the station must be exclusively used for the sale of Union Oil gasoline, with the alleged result that it was impossible for appellants to sell or lease the station (R.16).

D. Anti-Trust Issues as Defined in Pre-Trial Order

The Pre-Trial Order of Judge Hodge (R.114-18), who initially conducted the pre-trial proceedings, states that the anti-trust issues to be determined are: Whether the so-called exclusive requirements contract and the related transactions constituted a contract in restraint of

rade under Section 1 of the Sherman Act, 15 U.S.C. 1, or a monopoly under Section 2 of the Sherman Act, 15 U.S.C. 2 (R. 116, 117, ¶6(1) and (3)); whether Union Oil was discriminating in price, services or facilities in violation of the obinson-Patman Act, 15 U.S.C. § 13 (R. 117, ¶6(2)); when id the anti-trust claims accrue and the statute of limitations, 5 U.S.C. § 15b, commence to run (R. 117, ¶6(4)); and the issues f damages resulting from the claimed anti-trust violations R. 117, ¶6(5) and (6)).

No allegation is made by appellants in their omplaint of violation of Section 3 of the Clayton Act, 5 U.S.C. § 14, nor is it stated to be in issue in the re-Trial Order (R. 114-18). Appellants for the first ime refer to Section 3 of the Clayton Act in their ppeal brief; see appellants' brief, pages 9, 11, 12.

Upon entry of the Pre-Trial Order, the case was ransferred to Fairbanks (R. 118), where further proceedings ere conducted before Judge Plummer.

E. Appellants' Answers to Union Oil's Interrogatories

In order to define more precisely the scope of ppellants' anti-trust allegations in light of the Pre-rial Order, interrogatories were submitted by appellee R. 139-46). Appellants' Answer to Union Oil's Inter-

rogatory No. 1 (R.147-49), executed by Robert Hoopes under oath, reduces appellants' claims to the following:

> "The claim of plaintiffs is that Judge Rabinowitz in Cause No. 10230 in the Superior Court at Fairbanks by his Memorandum Decision, Findings of Fact, Conclusions of Law and Judgment, found and decided that Union Oil Company, by its various leases, leasebacks and discounts, kickbacks, secret guarantees, oral agreements made and extracted, and by a general course of action, established and maintained an exclusive requirements contract in connection with the service station on Cushman Street owned by plaintiffs and leased to Victor Hart and his successors, whereby the operators of the service station were required to, and did, over a long period of years, buy gasoline products exclusively from Union Oil Company and for a portion of that time, at least, received secret discounts and rebates from Union Oil in return for acknowledging and recognizing the exclusive requirements agreement, and that these actions, together with other actions on the part of Union Oil Company, conducted and carried on down to and including the fall of 1962, as alleged in plaintiffs' Complaint, constituted a contract in restraint of trade or commerce as a result of which plaintiffs' lessors were financially unable to continue to operate the service station, the same was closed and the plaintiffs were thereby damaged by loss of rental revenue and decrease in market value of the property. (emphasis added) (R.147-48)

* * *

> "while the actions of Union Oil Company probably constituted both contract and conspiracy in restraint of trade and commerce, plaintiffs have elected not to join other parties as conspirators, but claim that the transactions constituted a contract in restraint of trade and commerce whereby plaintiffs were damaged." (R.148-49)

In their answer to Union Oil's Interrogatory No. 5 (R.140), appellants stated:

> "The restraints of trade engaged in by Union Oil Company were directed against Victor Hart, his successors, his competitors and the public. Plaintiffs were not in the gasoline distribution business at the time but were lessors of Hart and his successors and were damaged by Union Oil's unlawful actions." (R.149)

Appellants also admitted they were never prevented from obtaining gasoline by any actions of Union Oil (Interrogatories 7 and 8, R.140-41; Answers 7 and 8, R.149; Court Order re Answers to 7 and 8, R.177).

F. Summary Judgment of the Court Below:

Union Oil moved for summary judgment (R.187) on appellants' anti-trust allegations as follows:

(a) Upon appellants' Sherman Act issues as defined in subparagraphs (1) and (3) of paragraph (6) of the Pre-Trial Order (R.116-17) on the grounds that appellants as lessors lacked standing to sue under either

Sections 1 or 2 of the Sherman Act for loss of rental income and reduced market value of their service station resulting from alleged Sherman Act violations of Union Oil against their lessee and for the further reason under subparagraph (3) of paragraph (6) of the Pre-Trial Order (R.117) relating to Section 2 of the Sherman Act that Union Oil could not possibly constitute a monopoly in restraint of trade in the Fairbanks or Alaska marketing areas.

(b) Upon appellants' Robinson-Patman Act claims as defined in subparagraph (2) of paragraph (6) of the Pre-Trial Order (R.117), on the ground that appellants were never purchasers from Union Oil against whom price discrimination was practiced (nor were they competitors of Union Oil who could be injured by any price discrimination by Union Oil).

(c) Upon the ground that the four year anti-trust statute of limitations, 15 U.S.C. § 15b, commenced to run in the year 1955, thereby barring the anti-trust allegations alleged in the Complaint which was not filed until 1963.

The court below granted Summary Judgment against

appellants and in favor of Union Oil upon appellants' First Cause of Action for anti-trust violations (R.205). The Summary Judgment eliminated all anti-trust claims of appellants --

> "... for the reason that plaintiffs lacked standing to sue under Sections 1 and 2 of the Sherman Act (15 USCA §§1 and 2), for the reason that under the facts of this case they are not persons injured in their business or property by reason of anything forbidden in the anti-trust laws, within the meaning of 15 USCA §15; and on the further ground that plaintiffs lacked standing to sue under Section 2 of the Clayton Act as amended by Robinson-Patman Act (15 USCA §13)" (R.197-198).

Since this disposed of all of appellants' anti-trust allegations (R.198), the Court did not rule on Union Oil's contentions that the four-year anti-trust statute of limitations, 15 U.S.C., § 15b, barred appellants' anti-trust claims (R.188) and that Union Oil could not possibly constitute a monopoly under Section 2 of the Sherman Act (R.187).

III

QUESTIONS PRESENTED

The following questions are posed to this Court on appeal from the Summary Judgment and related orders of the District Court (R.197-202, 205-06):

1. Whether appellants as lessors of a service station, receiving a fixed monthly rental, have standing to sue under Sections 1 and 2 of the Sherman Act, 15 U.S.C. Sections 1 and 2, for loss of rent income and reduced market value of their leased service station resulting when the lessee-operator failed financially and abandoned the station allegedly due to the onerous provisions of an illegal requirements contract in restraint of trade between the lessee-operator and appellee Union Oil, the gasoline supplier.

2. Whether appellants as lessors of a service station state a cause of action for price discrimination under the Robinson-Patman Act, 15 U.S.C. Section 13, when they were not at any time relevant to this action operators of the service station and were never either purchasers of products from or competitors of the alleged discriminator, Union Oil.

3. Whether an action commenced January 18, 1963 under the anti-trust laws by a contract vendor and later lessor of a service station for damages arising out of an alleged contract in restraint of trade is barred by the four year anti-trust statute of limitations, 15 U.S.C., § 15b, when the last overt act in completing the alleged contract in restraint of trade occurred on December 21, 1955, more than seven years prior to the date of commencement of the action.

IV.

SUMMARY OF ARGUMENT

Appellants as lessors of a service station lack standing to sue under Sections 1 and 2 of the Sherman Act, 15 U.S.C., Sections 1 and 2, for damages resulting to them from an alleged requirements contract in restraint of trade between their lessee, operator of the station, and appellee Union Oil, the gasoline supplier, for the reason that their alleged injuries are too remote to be cognizable under the anti-trust laws.

Appellants as lessors or contract vendors of a service station lack standing to sue under the Robinson-

Patman Act, 15 U.S.C. Section 13, for alleged price discrimination involving their lessee or contract vendee and other purchasers of gasoline from appellee Union Oil for the reason that at no time relevant to this action were appellants either purchasers of products from Union Oil or competitors of Union Oil.

As an alternative ground for dismissal not ruled upon by the District Court, appellants' anti-trust allegations are barred by the four-year anti-trust statute of limitations, 15 U.S.C. Section 15b, because the last overt act pertaining to the contract in restraint of trade which forms the basis for their anti-trust claims occurred December 21, 1955, more than seven years before commencement of this litigation on January 18, 1963, or in any event, not later than January 18, 1959.

V.

ARGUMENT

A. Appellants as lessors of a service station lack standing to sue under Sections 1 and 2 of the Sherman Act for damages resulting from an alleged contract in restraint of trade between their lessee, operator of the station, and Union Oil, the gasoline supplier, for the reason that their alleged injuries are too remote to be cognizable under the anti-trust laws.

Appellants' anti-trust damages are predicated upon the effects of the so-called requirements contract which they claim -

> "... constituted a contract in restraint of trade or commerce as a result of which plaintiffs' lessors were financially unable to continue to operate the service station, the same was closed, and the plaintiffs were thereby damaged by loss of rental revenue and decrease in market value of the property." (R.147-48; see also, appellants' brief, p.14.)

Appellants concede that a conspiracy is not alleged which would include either Transfare or Hart as co-conspirators with Union for the purpose of injuring appellants (R.215, 139, 176). Nor is there any suggestion of such a conspiracy anywhere in appellants' lengthy allegations and from the pre-trial proceedings.

Accordingly, the Sherman Act issue on this appeal may be stated as follows: Whether appellants as lessors of

a service station, receiving a fixed monthly rental, have standing to sue under Sections 1 and 2 of the Sherman Act for loss of rent income and reduced market value of their leased service station resulting when the lessee-operator failed financially and abandoned the station allegedly due to the onerous provisions of an illegal requirements contract in restraint of trade between the lessee-operator and appellee Union Oil, the gasoline supplier.

There has been considerable discussion in the cases in recent years concerning the right of a party only indirectly injured to sue under the anti-trust laws. In the group of lessor-lessee and analogous cases which have considered this matter, no case has held that a lessor may recover for loss of rent or decrease in market value of his property resulting when the lessee has been the victim of anti-trust violations.

On the other hand, where the lessee has been a co-conspirator with others to injure the lessor, some, but not all, of the cases hold that the lessor is entitled to sue the lessee and his co-conspirators.

The first decision to give the lessor-lessee problem extended consideration is Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312 (E.D.Pa., 1953), aff'd 211 F. 2d 405 (1954), cert. den. 348 U.S. 828, 99 L.Ed. 653, 75 S.Ct. 45 (1954). There, an action was brought by a non-operating motion picture theatre owner against a film producer and a distributor for conspiracy to restrain trade by denying first-run pictures to the lessee of plaintiff's theatre. The opinion of Judge Kirkpatrick does not clearly state whether the lessee was a conspirator or merely a victim of the conspiracy. Subsequent decisions appear to have construed it both ways. Judge Kirkpatrick concluded that the lessor was not a person "injured in his business or property", within the meaning of 15 U.S.C., Section 15, the anti-trust enforcement statute.

The Harrison decision was subsequently followed by the Third Circuit in Melrose Realty Co. v. Loew's Inc., 234 F. 2d 518 (3rd Cir.1956) in which the court declined to permit an action for conspiracy by a lessor theatre operator against the lessee.

> Accord: Lieberthal v. North Country Lanes, Inc., 221 F. Supp. 685 (1963), aff'd on other grounds, 332 F. 2d 769 (2nd Cir. 1964).

The Harrison decision was distinguished in Steiner v. 20th Century Fox Film Corporation, 232 F.2d 190 (9th Cir., 1956). There, an action was brought by a lessor of a motion picture theater alleging a conspiracy between a producer, a distributor and a lessee to force the lessor to receive less than reasonable rent for his theater. In that opinion this court very clearly states the distinction between the situations where the lessor sues when the lessee is a victim of a conspiracy and when the lessee is a participant in a conspiracy against the lessor. Steiner involved the latter situation and this court concluded the lessor was entitled to sue. This court apparently construed Harrison to be a case where the lessee was a victim of a conspiracy, rather than a conspirator when it stated:

> "In Harrison v. Paramount Pictures... there were no direct dealings between the plaintiff and defendant. Here the [lessor] asserts the [producer and distributor] conspired with the prime lessee to force the [lessor] to receive less than a reasonable rent."

In the Seventh Circuit the right of a lessor to sue was next considered at length in Congress Building Corp. v. Loew's, Inc., 246 F. 2d 587 (7th Cir., 1957). There, an

action was brought by a non-operating owner-lessor of a motion picture theatre alleging a conspiracy of the lessee, distributors and other exhibitors to monopolize the exhibition of motion pictures. Judge Swaim in his opinion meticulously analyzes the Harrison case, supra, on the assumption that Harrison was a case where the lessee was a conspirator and on that basis, declines to follow it.

The Opinion discusses much of the case law in this area and reconciles most of the decisions on the lessee-as-victim and lessee-as-conspirator distinction. While Judge Swaim's decision is unquestionably more favorable to appellants than some others, his opinion itself differentiates the present circumstances, when it states:

> "It is also true that [there] ... may be grounds for distinction in cases where the lessee is also injured as a result of anti-trust violations, and cases where the lessee is a party to the anti-trust violations. For example, would the defendants be subject to actions, one by the lessor and one by the lessee. Suppose the lessee sues first and recovers, should the damages be apportioned between lessors and lessees and, if so, how? Another problem is that of settlements by one of the parties without the participation or consent of the other. ... None of these problems is present in the lessor situation where the

lessee is a party to the anti-trust violations, and may justify a different result." (p. 591).

It is conceded that Judge Swaim more broadly interpreted the scope of 15 U.S.C., Section 15, than had Judge Kirkpatrick in the Harrison case. Subsequent case discussion, however, has cast doubt on the validity of this broader interpretation even in the Seventh Circuit.

In Sandidge v. Rogers, 256 F. 2d 269 (7th Cir., 1958), a lessor of a quarry brought an action against a lessee and others for conspiracy in violation of the anti-trust laws. The lessor claimed that as part of the conspiracy the lessee halted production from the quarry which, in turn, reduced her rent income which was paid in part on a ton-royalty basis. Judge Hastings in a concurring opinion states at page 278 that he has "grave concern that the holding in the Congress case goes too far". But since the trial court in the Sandidge case had ruled against the defendants with respect to the right of the lessor to sue on the basis of Congress and no issue had been raised on appeal on this matter, Judge Hastings indicates that the matter was properly not considered in the majority opinion.

For further critical comment of Congress, see also Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F. 2d 383 (6th Cir., 1962), discussed below at page 27.

Erone Corporation v. Skouras Theatres Corp., 166 F. Supp. 621 (S.D.N.Y., 1957) also involved a lessee-conspirator and the plaintiff lessor was found to have standing to sue. But the court in so holding stated:

> "... the Third Circuit has denied relief to a non-operating owner-lessor [citing Harrison and Melrose, supra] while the Ninth and Seventh Circuits have allowed the relief, at least if the lessee of the theatre is engaged in the conspiracy [citing Steiner and Congress, supra]."

On the other hand, in all of the decisions which have been decided where the lessee (or party in analogous circumstances) has been the victim of a conspiracy, the lessor (or the more remotely damaged party) has not been entitled to sue.

The Second Circuit considered this problem in Productive Inventions v. Trico Products, Corp. 224 F. 2d 678 (2nd Cir., 1955), cert. den. 350 U.S. 936, 100 L.Ed. 818, 76 S.Ct. 301(1956). There it was held that a licensor

of a patent is not entitled to sue under the anti-trust laws for loss of royalties where its licensee was a victim of an alleged anti-trust violation. In this holding the Second Circuit followed the earlier rulings from the Southern District of New York in lessee-"victim" cases in Folly Amusement Holding Corp. v. Randforce A. Corp., 32 F.Supp. 361 (S.D.N.Y., 1939); and Westmoreland Asbestos Co. v. John Mansville Corp., 30 F.Supp. 389 (S.D.N.Y., 1939), aff'd 113 F. 2d 114 (2nd Cir., 1940). In Productive Inventions, the court also approved of the Harrison decision.

The First Circuit in its decisions has followed the rule prohibiting the indirectly damaged party from suing. In Snowcrest Beverages v. Recipe Foods, 147 F. Supp. 907 (D.Mass., 1956), a supplier of a corporation which had been the victim of anti-trust violations was not permitted to recover, Judge Wyzanski there citing the Melrose case from the Third Circuit and the Productive Inventions case from the Second Circuit.

In Miley v. John Hancock Mutual Life Insurance Co., 148 F.Supp. 299 (D.Mass., 1957), aff'd 242 F. 2d 758 (1st

Cir., 1957) an insurance agent who had failed to receive commissions when his company failed to obtain a contract as a result of a conspiracy of the defendants was not entitled to recover, the court citing Melrose and Productive Inventions.

More recent cases in the Sixth Circuit have followed the same approach. In United Mine Workers of America v. Osborne Mining Co., 279 F. 2d 716 (6th Cir., 1960) it was held a coal sales agency could not recover damages for loss of sales commissions resulting when the business of a mining company it represented was destroyed by the unlawful activities of the defendants. While this case did not arise under the anti-trust laws the case law under discussion here was cited as controlling. The defendants cited Melrose, Harrison, Productive Inventions and Snowcrest while the plaintiff cited Congress and Steiner. The court distinguished the latter two cases by stating:

> "In Congress Building and Steiner, the lessees were parties to the conspiracy. ... In the present case unlike the cited cases, [the mining company] was not a party to any conspiracy nor is there any claim that [it] committed any wrong of any kind against [plaintiff]." (pp. 728-29).

The same reasoning was applied by the Sixth Circuit in the recent case of Volasco Products Co. v. Lloyd A. Fry Roofing Company, 308 F. 2d 383 (6th Cir., 1962), cert. den. 372 U.S. 907, 9 L.Ed. 2d 717, 83 S.Ct. 721 (1963), where a supplier was not entitled to damages for loss of sales it otherwise would have made to its customer injured as a result of an anti-trust conspiracy. The plaintiff supplier relied upon Congress. The Sixth Circuit distinguished Congress on the ground that "the lessee was one of the co-conspirators" (page 394) and went on at pages 394-95 to criticize the suggestion in Congress of a broader interpretation of 15 U.S.C., Section 15.

In a recent case arising in the Second Circuit, Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp., 193 F.Supp. 401 (S.D.N.Y., 1961), a non-operating theatre owner-lessor was held not entitled to recover damages for reduced profits resulting from a conspiracy of producers and distributors directed against the lessee of plaintiff's theatre. The court cited Harrison, Melrose, John Mansville and Productive Inventions.

It should be noted that typically in these cases where lessors (or persons similarly situated) have sued parties conspiring against their lessees (or analogous persons), the plaintiffs have suffered losses they otherwise would not have incurred or failed to earn profits they would have earned but for the conspiracies complained of. Still, the complainants did not have standing to sue. Hence, the statement in the Harrison case, referred to in appellants' appeal brief at page 20:

> "This is not a case in which by reason of the unlawful acts of the defendant a tenant has been forced to default in his rent. That situation need not be considered here."

is not the basis for differentiating the cases. In Harrison, the lessor had a percentage lease with a fixed minimum rent which was at all times received. Judge Kirkpatrick probably was merely emphasizing that the lessor there had not in his opinion really been damaged.

However, in all the other so-called "victim" cases the more remote complainants had been injured and still were not allowed to recover. Thus, the critical factor is not the extent of the loss but the remoteness of the lessor to

the party injuring the lessee-victim.

In the Ninth Circuit, the Steiner case, at most, supports the position that a lessor can sue where his lessee is a co-conspirator against him. With this position Union does not disagree. Any suggestion to the contrary from the Third Circuit in the Harrison and Melrose cases cited, supra, is probably incorrect. But the Steiner case does not support appellants' position, since appellants were in no way the object of a conspiracy or anti-trust violation. They by their own allegations were injured only indirectly as a result of the alleged injuries suffered by their lessee.

Any broad interpretation of 15 U.S.C., Section 15, which may be read into Judge Learned Hand's opinion in Vines v. General Outdoor Advertising Co., 171 F.2d 487 (2nd Cir., 1948), cited by appellants at page 20 of their appeal brief, must be read in light of his more recent opinion in Bookout v. Schine Chain Theatres, 253 F.2d 292 (2nd Cir., 1958), where it was held that a shareholder could not recover for damages to his shareholdings because of conduct which was an injury to the corporation. Judge Hand stated:

> "As a new question it might perhaps be argued that if a shareholder, or a creditor, or any other person has been injured by a conspiracy under the anti-trust acts, a claim arises in his favor quite separate from any claim of the corporation. Be that as it may, this has not been the course of the decisions, which have distinguished between injuries arising directly from a conspiracy and those that are only 'indirectly' or 'incidentally' its result. Such was the situation in Loeb v. Eastman Kodak Co., supra, 183 F. 704, 709; Westmoreland Asbestos Co. v. John Mansville Co., supra, 30 F. Supp. 289, affirmed 113 F. 2d 114; Peter v. Western Newspaper Union, supra, 200 F.2d 867, 872, 873; Productive Inventions v. Trico Products Corp., 2nd Cir., 224 F. 2d 678; and Gerli v. Silk Association of America, supra, 36 F.2d 959." (p.295).

Appellants also quote from Karseal Corp. v. Richfield Oil Corp., 221 F. 2d 358 (9th Cir., 1955) at page 21 of their appeal brief as follows:

> "The treble damage action is one for a tort and punitive and compensatory damages is the relief granted. 'Under the Clayton Act the right is not confined to persons in privity with the wrongdoer, but is given to anyone who has suffered injury to his business or property by reason of the wrongful acts.' Clark Oil Co. v. Phillips Petroleum Co., supra, 148 F. 2d at pages 582-583. Vines v. General Outdoor Advertising Co., 2d Cir., 1948; 171 F. 2d 487, 491." (p. 363).

However, immediately following this quotation, the opinion in Karseal goes on:

"Turning now to the cases concerning 'target area' or proximate causation, the rule is that one who is incidentally injured by a violation of the anti-trust laws, -- the bystander who was hit but not aimed at -- cannot recover against the violator [citing cases].

In accordance with the foregoing rule, directness of injury was held lacking in suits by (a) shareholders, [citing cases]; (b) officers of corporations, [citing case]; (c) creditors [citing case]; and (d) Landlords [citing cases]." (p. 393).

The Karseal opinion then quoted from Conference of Studio Unions v. Lowe's, Inc., 193 F. 2d 51 (9th Cir., 1951):

"[A] Plaintiff ... must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise, he is not injured 'by reason' of anything forbidden in the anti-trust laws.

Such a construction is in accordance with the basic and underlying purpose of the anti-trust laws to preserve competition and to protect the consumer. Recovery of damages under the anti-trust laws is available to those who have been directly injured by the lessening of competition and withheld from those who seek the windfall of treble damages because of incidental harm." (page 363).

The Conference case was subsequently cited approvingly in Snowcrest discussed, supra, at page 26, and the recent Volasco case discussed, supra, at page 28.

Although not cited by appellants, counsel for appellee feels obliged to call the Court's attention to its recent opinion in Harman v. Valley National Bank of California, 339 F. 2d 564 (9th Cir., 1964). There an action for treble damages was brought by an investment company which alleged that the defendants had induced the State Attorney General to place a Savings and Loan Association in receivership where the receiver had refused to honor the contractual obligations of the plaintiff, thereby causing plaintiff's injury. The Attorney General was alleged to have participated in the conspiracy which was alleged to be part of a larger scheme to restrain and monopolize the Arizona money market, all to the direct injury of the plaintiff. The Trial Court granted a motion to dismiss for failure to state a claim. While Judge Browning's opinion might be interpreted as narrowing the application of the Karseal "target-area" doctrine, this Court concluded:

> "There is nothing in the allegations of the Complaint which would preclude proof that the alleged conspiracy was aimed, in part, directly at the refinancing arrangements between [plaintiff] and the Association."

The case was then remanded for further clarification of the vaguely alleged issues without a ruling on whether a claim was in fact stated with the following comment:

> "It may be well to repeat, in the words of Judge Barnes, that a motion to dismiss is not 'the only effective procedural implement for the expeditious handling of legal controversies. Pre-trial conference; the discovery procedures; and motions for a more definite statement, judgment on the pleadings and summary judgment, all provide useful tools for the sifting of allegations and the determination of the legal sufficiency of an asserted claim short of trial. Rennie & Laughlin, Inc. v. Chrysler Corp., 242 F. 2d 208, 213 (9th Cir., 1957). See also Shull v. Pilot Life Ins. Co., 313 F. 2d 445, 447 (5th Cir., 1963)."

In the present case, lengthy pre-trial proceedings and delineation of the issues in the Pre-Trial Order preceded the Trial Court's entry of summary judgment.

Thus, cases arising in the Ninth Circuit do not support appellants' position that they as lessors are entitled to sue where their lessee was allegedly the victim of appellee's contract in restraint of trade. Nor do the cases arising in the other circuits support their position. All of the cases can be reconciled where the lessee is a

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victim of the anti-trust offense which, in turn, causes injury to the lessor. In this circumstance -- which is the circumstance of this case -- the lessor is not entitled to sue. The only conflict in the decisions arises in circumstances where the lessee is a participant in the anti-trust offense -- which is not the circumstance of this case.

Appellants in their appeal brief (pp.34, 37) cite and discuss Simpson v. Union Oil Co., 377 U.S. 13, 12 L.Ed. 2d 98, 84 S.Ct. 1051 (1964) reversing 311 F. 2d 764 (9th Cir., 1963) where the Supreme Court held, in an action by a service station lessee against the lessor Union Oil, that the use of a consignment agreement by Union Oil in the circumstances of that case was illegal under the anti-trust laws. Even assuming that the Simpson case would be somehow relevant if the operator of appellants' service station had been the plaintiff in this proceeding, it has no possible relevance where the plaintiffs were the nonoperating contract vendors or lessors of the station who were not parties to the alleged contract in restraint of trade.

Appellants also cite for the first time in their appeal brief (pp.11, 12) Section 3 of the Clayton Act, 15 U.S.C. Section 14, which prohibits exclusive dealing contracts which may substantially lessen competition or tend to create a monopoly. Since this statute was neither alleged nor ever cited in the pre-trial proceedings, appellants should not now be allowed to claim its application. But in any event, appellants have no better standing to sue under its provisions than under Sections 1 and 2 of the Sherman Act since the so-called exclusive requirements contract was between Union Oil and the station operators. Accordingly, the foregoing case discussion applies with equal force to any claim that Section 3 of the Clayton Act is applicable.

B. Appellants as lessors or contract vendors of a service station lack standing to sue under the Robinson-Patman Act, 15 U.S.C. §13, for alleged price discrimination between their lessee or contract vendee and other purchasers of gasoline from appellee Union Oil for the reasons that appellants at no time relevant to this case were either purchasers of products from Union Oil or competitors of Union Oil.

1. Appellants never purchased gasoline from Union Oil nor were they competitors of Union Oil.

In granting partial summary judgment the district court ruled that:

> "... Plaintiffs lacked standing to sue under § 2 of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C.A. §13)." (R.198; see also R.170-71).

Although the District Court in its order did not state the specific reasons for its conclusion, from the cases it cites and the earlier briefs and argument it is clear the bases for the Court's conclusion were that appellants were neither purchasers from Union Oil nor competitors of Union Oil.

Appellants concede they never were purchasers (R.215; Interrogatories 7 and 8, R.140-41, and appellants' Answers, R.149, 177). And nowhere in the record is there any suggestion that appellants were competitors of Union Oil. As mere lessors or contract vendors of the station to the actual operators it is patent that appellants could not possibly be competitors of Union Oil in the areas of producing, refining or marketing of petroleum products. (See appellants' Answer to Interrogatory No. 5, R.149). Curiously, appellants

claim Union Oil discriminated in price in favor of their lessee which, if true, should have financially strengthened, not weakened, their lessee (R.7-8, 147). The real thrust of appellants' price discrimination allegations is damage to the public interest, as a result of which, somehow, appellants consider themselves to have been injured.

2. To state a claim for price discrimination under the Robinson-Patman Act appellants must either have been purchasers from or competitors of Union Oil, the alleged discriminator.

In order to consider the several cases cited by appellants in support of their claim of price discrimination under Section 2(a)*, a brief analysis of the structure of that section is necessary.

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*15 U.S.C. §13(a). To avoid confusion with 15 U.S.C. 13a, the codification of Section 3 of the Robinson-Patman Act, references here will be to the sections of the Clayton Act as amended by the Robinson-Patman Act.

The cases construing Section 2(a) normally relate to price discrimination which results in injury to competition at two different levels of competition: (1) competition with the seller who grants the discrimination (primary line competition), and (2) competition with the seller's customer purchasing at a lower price (secondary line competition).* The typical situation involving competing sellers is local price cutting by a large seller having wide distribution for the purpose of injuring a competing local competitor. The typical situation involving competing purchasers is the granting of a price advantage by a common seller to one purchaser but not to another purchaser. For a general discussion of the structure of Section 2(a) and the different levels of competition to which it applies, see Austin, Price Discrimination and Related Problems Under the Robinson-Patman Act, June, 1959 Joint Committee on Continuing Legal Education, American Law Institute, Pages 40-50; Thumann, "Territorial Discrimination, Robinson-Patman, and a Rule of Reasonable Probability", 8 U.C.L.A. L. Rev. 363, 365-66. See also, Federal Trade Com.

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*There is a third level, competition with a customer of a customer purchasing at a lower price, which does not apply to the present case.

v. Annheuser-Busch, 363 U.S. 536, 542-45, 4 L. Ed. 2d 1385, 1389-91; Van Camp & Sons Co. v. American Can Co., 278 U.S. 245, 73 L. Ed. 311 (1929).

All of the cases which appellants have cited to support their Section 2(a) claims either present fact situations involving injury to competition at the level of competing sellers or simply are not relevant in a discussion of Section 2(a). Obviously, where a seller has discriminated in price between different purchasers and has thereby injured a competitor of the seller, the competitor need not himself be a purchaser to come within the scope of Section 2(a).

The case of Moore v. Meads Fine Bread Co., 348 U.S. 115, 99 L. Ed. 145 (1955), cited and discussed at Page 32 of appellants' brief, is representative of this type of primary-line competitive injury. In the Moore case an interstate baking corporation and a local baker were engaged in competition for a local market. The interstate baker sharply cut its price in that local market only and kept its prices high elsewhere and thereby forced the local baker out of business. This kind of competition by the large interstate concern, involving the financing of its local price war by profits made elsewhere, is what prompted the words of Justice

Douglas quoted by appellants:

> "This type of price cutting was held to be 'foreign to any legitimate commercial competition' even prior to the Robinson-Patman Act."

Karseal Corporation v. Richfield Oil Corporation, 221 F.2d 358 (9th Cir., 1955), discussed at page 30 of appellants' brief, does not involved Section 2(a), but Section 3 of the Clayton Act (15 U.S.C. Sec. 14) which pertains to exclusive dealing arrangements, and Sections 1 and 2 of the Sherman Act. It also again presents the circumstance of primary-level competition between competing sellers and the lengthy quotes from the court's opinion must be understood in that context. The other Ninth Circuit case cited by plaintiff, Steiner v. Twentieth Century Fox Film Corporation, 232 F.2d 190 (9th Cir., 1956) was limited to Sections 1 and 2 of the Sherman Act and is discussed supra at page 22. Appellee sees no relevance of Steiner to Robinson-Patman allegations.

On the other hand, the cases considering the standing necessary to sue where secondary-level competition is involved - the circumstance of the operators of the service station here in issue - clearly require that the complainant must be a purchaser who has been injured by failure to

receive as low a price as his competitor has received from the same seller.

In a case arising in the Ninth Circuit, Bolick-Gillman Company v. Continental Baking Company, 206 F. Supp. 151 (D.Nev., 1961), a wholesale distributor of bread for an Arizona baker sued a Utah baker under Section 2(a) on the grounds that the Utah baker sold to a distributor competing with the plaintiff at a lower price than it sold to other distributors elsewhere, thereby allegedly injuring plaintiff. The Nevada District Court in a scholarly opinion held that Section 2(a) does not allow a cause of action where the complaining party was neither in competition with the defendant baker nor a purchaser from the defendant. The Court stated:

> "The question is whether plaintiff is within the scope of those statutes which make certain types of conduct illegal and give to certain persons the right to recover damages which result from such conduct. We note, initially, that although Section 4 of the Clayton Act states, in relevant part, that 'any person who shall be injured * * * may sue,' the Courts have not seen fit to read that provision literally. Thus, even though injured by reason of violation of the antitrust laws, certain persons have been held unable to maintain private damage suits. Among such persons are shareholders, officers of corporations, creditors and landlords. See Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 363 (9th Cir., 1955)...."

"[W]e are satisfied... that a plaintiff, when suing to enforce the Act on a theory of injury to primary-line competition, must allege and prove that it was in competition with the defendant. We are aware of no cases, and plaintiff has cited none, which have allowed a person to sue on a theory of injury to primary-line competition who was not, himself, a competitor of the alleged wrongdoer. This is not to say, however, that a person who is not a competitor of the grantor of a discriminatory price has no recourse against the wrongdoer. Another purpose of the Act is to protect so-called 'secondary-line competition.' George Van Camp & Sons Co., v. American Can Co., 278 U.S. 245, 49 S. Ct. 112, 73 L. Ed. 31 (1929). Here, we are typically dealing with a case in which one of two buyers of the same seller is injured in the competition for the resale of goods because the other buyer obtains his goods from the seller at a more favorable price. Thumann, op.cit.supra, at 366. We have no doubt but that the essence of a secondary-line case is the injury to competing buyers from the same seller. See F.T.C. v. Morton Salt Co., 334 U.S. 37, 45 et seq., 68 S. Ct. 822, 92 L. Ed. 1196 (1948), where there are repeated phrases such as 'competitive injury between a seller's customers.' Accordingly, we are satisfied that a plaintiff, when suing to enforce the act on a theory of injury to secondary-line competition, must allege and show that he was a purchaser from the defendant and that he was in competition with one or all of the favored dealers. See Youngson v. Tidewater Oil Co., 166 F. Supp. 146, 147 (D. Ore., 1958); Alexander v. Texas Co., 149 F. Supp. 37, 41 (W.D. La., 1957); Baim & Blank, Inc. v. Philco Corp., 148 F. Supp. 541, 543 (E.D.N.Y., 1957). Compare Klein v. Lionel Corp., 237 F. 2d 13, 14-15 (3rd Cir., 1956).

"[W]e are of the opinion that, in a primary-line case, only a competitor of the defendant is entitled to the windfall of treble damages, and that, in a secondary-line case, only a

customer of the defendant may bring suit. (pp. 152-54, emphasis added.)*

In Klein v. Lionel Corp., 237 F.2d 13 (3rd Cir., 1956) summary judgment of the trial court was affirmed where a retailer complained that the price he paid to his middleman supplier was higher than other large retailers paid who purchased directly from the manufacturer. The Third Circuit stated:

> "...an individual can have no cause of action under Section 2(a) of the Clayton Act unless he is an actual purchaser from the person charged with the discrimination."(pp. 14-15)

In Ben B. Schwartz & Sons, Inc., v. Sunkist Growers, Inc., 203 F. Supp. 92 (E.D. Mich. S.D., 1962), a wholesaler claimed damages for alleged discrimination under Section 2(e) of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C., Sec. 13(e)), by a marketing association for its

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* The Plaintiff in Bolick-Gillman had earlier appealed from an unpublished opinion dismissing the complaint which had alleged violation of Section 1 of the Sherman Act and Section 2(a) of the Clayton Act. The Ninth Circuit reversed in a per curiam decision, 278 F. 2d 649 (9th Cir., 1960). Upon remand, only Section 2(a) was in issue and a renewed motion to dismiss was granted. The effect of the reversal of the original dismissal is discussed by Judge Ross at footnote 1, page 153 of his opinion, where he makes it clear that the issue of the Plaintiff's standing to sue under Section 2(a) had not been decided by the Ninth Circuit in the earlier appeal.

refusal to provide equivalent services and facilities available to other large purchasers and for its refusal to sell directly to the plaintiff. The phrasing of Sections 2(a) and 2(e) are strikingly similar. Section 2(a) provides:

> "It shall be unlawful for any person ... to discriminate in price between different purchasers of commodities..."

Section 2(e) provides:

> "It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity ... by furnishing ... any services or facilities ...not accorded to all purchasers on proportionately equal terms."

Judge Thornton held that the alleged violation did not fall within the scope of Section 2(e) and stated:

> "How can plaintiffs rely upon the manner of discrimination for their cause of action without preliminarily establishing that they are purchasers? The testimony not only fails to establish that plaintiffs are purchasers from defendant but establishes positively that they do not purchase from defendant. That is one of their complaints - that defendant refuses to sell to them. Chief Judge Biggs states unequivocally that one must be a direct purchaser to be entitled to protection under the Act. Klein v. Lionel Corp., 3 Cir., 1956, 237 F.2d 13. This seems to us to be in accord with the plain language of this section of the Act..."

Because of the similarity between Sections 2(a) and 2(e) Judge Thornton's reasoning applies with equal force to Section 2(a).

See also Baim & Blank, Inc. v. Philco Corporation, 48 F. Supp. 541 (E.D.N.Y. 1957), where secondary-line competition was in issue and the Court stated:

> "Plaintiff does not dispute one cannot have a cause of action for a violation under Section 2(a) of the Clayton Act, * * * unless one is an actual purchaser from the person charged with the discrimination. See Klein v. Lionel Corp. * * *." (Page 543, emphasis added).

In Youngson v. Tidewater Oil Company, 166, F. Supp. 146 (D. Ore., 1958), cited in Bolick-Gillman, supra, and arising in the District of Oregon, an action was brought under Section 2(a) by a service station operator against a gasoline distributor alleging the distributor had discriminated in sales of gasoline to the operator. Judge Solomon granted a motion to dismiss where the operator failed to allege he actually lost business as a result of such discrimination. The Court stated:

> "In my view, to come within the reach of the provisions of the Robinson-Patman Act, one

> "must show lost profits resulting from the necessity of meeting the prices of favored competitors or lost sales to such favored competitors, due to one's inability to meet their prices, or both.

Thus, in Judge Solomon's view, it was essential for the plaintiff to allege he had been injured as a result of discriminatory sales to him, not to some third party. See also, Alexander v. Texas Company, 149 F. Supp. 37, 40-41, (W.D. La., 1957) to the same effect.

Since appellants were neither purchasers from Union Oil nor its competitors, the District Court properly dismissed their Robinson-Patman allegations of discrimination by Union Oil.

C. Appellants' Anti-Trust Allegations are barred by the four year anti-trust statute of limitations, 15 U.S.C., Section 15b, because the last overt act pertaining to the contract in restraint of trade occurred December 21, 1955, more than seven years before commencement of this litigation on January 18, 1963.

The lease-leaseback between Victor Hart and Union Oil and the related financing arrangements which Judge Rabinowitz concluded constituted a requirements contract (R.35-6, 79), were executed December 21, 1955 (R.6-7, 31-2).* Hart's obligations were subsequently assumed by his successor station operators culminating in the alleged financial failure of the operator Transfare, Inc. (R.12; appellants' brief, p. 14). While appellants now attempt to establish that their injuries occurred much later (appellants' brief, p. 19), all of their claims arise from and are a result of the December 21, 1955, contracts.

Even assuming Union Oil's consent to Hart's sublease to Schroeder and Wisel of February 10, 1956, (R.12, 34, 77) or its subsequent consent to operation by Transfare Inc. (R.34), or the May 18, 1958 quitclaim of the premises back to appellants by Hart and Transfare (34, 77) could be "overt acts" involving Union Oil, the

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* There were a few supplemental documents executed shortly after December 21, 1955 between Hart and the Bank (R.76). The chattel mortgage to the bank from Hart was

four-year statute of limitations would still bar appellants' claims since their action was not commenced until January 18, 1963, (R.1) more than four years later.

15 U.S.C., Section 15b provides:

> "Any action to enforce any cause of action under [the anti-trust laws] shall be forever barred unless commenced within four years."

This court has stated with precision when the statute of limitations commences to run on an anti-trust claim. In Steiner v. 20th Century-Fox Film Corporation, 232 F. 2d 190 (9th Cir., 1956), discussed, supra, with regard to the merits of appellants' Sherman Act claims, the issue of when the statute of limitations commenced to run was discussed at length. There a theater lessee was alleged to have conspired with others against a lessor to monopolize the exhibition of motion pictures. This court stated:

> "The question: When does the statute of limitations begin to run? points to the first problem which must be here resolved. Appellant contends that where damages are in their nature continuing the statute runs from the date of the last injury. Under this view the statute of limitations would not run until all injury to a claimant had ceased. We must disagree. In a civil conspiracy, the statute of limitations runs from the commission of the last overt act alleged to have caused damage. [Citing cases].

"Appellant has interpreted the following language in Suckow Borax Mines Consol. v. Borax Consolidated, 185 F. 2d at page 208:

> "'* * * private civil antitrust actions are founded, not upon the mere existence of a conspiracy, but upon injuries which result from the commission of forbidden 'overt acts' by the conspirators, * * *.'"

to mean that the statute of limitations runs not from the overt act, but from the damages sustained. This quotation from Suckow Borax Mines Consol. v. Borax Consolidated, supra, is similar to statements in Foster & Kleiser Co. v. Special Site Sign Co., supra, 85 F.2d at page 751, and Burnham Chemical Co. v. Borax Consolidated, supra, 170 F.2d at page 577. These statements are in turn based upon language in Bluefields S. S. Co. v. United Fruit Co., supra, 243 F. at page 20, to the effect that the statute of limitations begins to run when the cause of action arises, and the cause of action arises when damage is sustained. We do not construe these cases to substantiate appellant's contention. These decisions merely hold that in order to start the running of the statute of limitations there must be damage occasioned by an overt act. In a continuing conspiracy causing continuing damage without further overt acts, the statute of limitations runs, as we have noted, from the time the blow which caused the damage was struck. Any further internal injury affects the problem of how much should be claimed in damages, not the problem of when the statute of limitations commences to run. Otherwise, in a continuing conspiracy, the cause of action of an injured party would never fully develop, nor would there be any limitation upon the right of action, and the beneficent purpose of the statute to delimit the right to sue would be defeated."[Citing cases]. (pp.194-95).

The lessee-defendant contended the statute of limitations began to run upon execution of the lease in which event the action would have been barred while the lessor-plaintiff claimed the statute of limitations did not begin to run until the theater was closed by the lessee-conspirator prior to the expiration of the term of the lease on the theory the closure was an overt act in furtherance of the conspiracy.

This court concluded that whether the closure of the theater was part of the conspiracy had not been determined. The case was accordingly remanded for determination of this fact. But the court made it clear that any damages recoverable would be limited to injury from the closure of the theater, since all earlier damages were barred by the statute of limitations.

The present facts have a substantial similarity to those of the Steiner case with the critical difference that in Steiner the lessee who closed the theater was a conspirator and the closure could be found to be an overt act of the conspiracy, whereas here neither the lessee-operator Transfare who ultimately abandoned the station, nor the preceding operators were part of a conspiracy.

Hence, here, the last overt act by Union, the alleged wrongdoer, which caused appellants' injuries could only be the execution of the lease-leaseback, or requirements contract, with Victor Hart on December 21, 1955, more than seven years prior to commencement of the action.

Accord: Suckow Borax Mines Consolidated v. Borax Consolidated, 185 F. 2d 196 (9th Cir., 1950) cert. den., 340 U.S. 943, 71 S.Ct. 506, 95 L.Ed. 680 (1951), cited and discussed in the Steiner opinion; Momand v. Universal Film Exchanges, 172 F. 2d 37 (1948) cert. den., 336 U.S. 967, 69 S.Ct. 939, 93 L.Ed. 1118 (1949); and Farbenfabriken Bayer, A.G. v. Sterling Drug., 153 F.Supp. 589, (D.N.J. 1957) aff'd on other grounds 307 F. 2d 210 (3rd Cir., 1962), cert. den., 372 U.S. 929, 83 S.Ct. 872, 9 L.Ed. 2d 733 (1963). In the latter case, the district court stated:

> "A civil action for conspiracy is essentially an action in tort. It is well established that such an action cannot be maintained in the absence of: first, the overt act of one or more of the conspirators in the furtherance of the conspiracy; and second, the consequential damage to the rights of another of which the overt act is the proximate cause. The

> gravamen of the action lies not in the conspiracy but in the overt act. A cause of action accrues upon the commission of an overt act followed by damage to another of which the overt act is the proximate cause. The statute of limitations runs from the commission of the last overt act alleged to have caused damage. Park-in Theatres v. Paramount-Richards Theatres, D. C., 90 F. Supp. 727, affirmed 3 Cir., 185 F.2d 407, certiorari denied 341 U.S. 950, 71 S. Ct. 1017, 95 L.Ed. 1373; see also: Northern Kentucky Tel. Co. v. Southern Bell T. & T. Co., 6 Cir., 73 F.2d 333, 335, 97 A.L.R. 133, certiorari denied 294 U.S. 719, 55 S. Ct. 546, 79 L.Ed. 1251; Steiner v. 20th Century-Fox Film Corporation, 9 Cir., 232 F.2d 190, 194-195. The victim of the conspiracy may continue to suffer damage long after the last overt act has been committed, but, if he is to preserve his cause of action, he must commence suit within the period defined by the applicable statute of limitations. Ibid."(pp. 592-3).

The Court then quoted at length from the opinion of this court in the Steiner case.

Since the gravamen of appellants' claims is the 1955 requirements contract, their subsequent injuries are not now actionable. For this additional, alternative reason, the partial summary judgment of the court below should be affirmed.

VI.

CONCLUSION

Based upon the allegations of a contract in restraint of trade and price-fixing arising out of the lease-leaseback or requirements contract of December 21, 1955, between Victor Hart and Union Oil, one could perhaps conclude that had Victor Hart or his successors been the plaintiffs in this action their complaints would have withstood a motion for summary judgment.

But neither Victor Hart nor the successor station operators are parties to this action or any other action against Union Oil, nor are they in any way alleged to have been participating conspirators. If anti-trust allegations were to have been timely made, Hart and his successor station operators should have made such allegations, not appellants.

While the summary judgment procedure should surely be used with caution, in the present case pre-trial discovery proceedings and pre-trial conferences extending

over more than two years before Judge Hodge and Judge Plummer were used liberally in order to define the issues prior to the entry of summary judgment.

It is respectfully submitted that the District Court properly dismissed appellants' Sherman Act and Robinson-Patman Act claims because of their lack of standing to sue under either Act. In addition, appellants' anti-trust claims are barred by the four-year anti-trust statute of limitations and for this alternative reason the dismissal of appellants' anti-trust claims by the District Court should be affirmed.

DATED at Seattle, Washington, September 17, 1965.

LITTLE, GANDY, STEPHAN, PALMER
& SLEMMONS

BY: _____
Herbert S. Little

BY: _____
Richard W. Hemstad

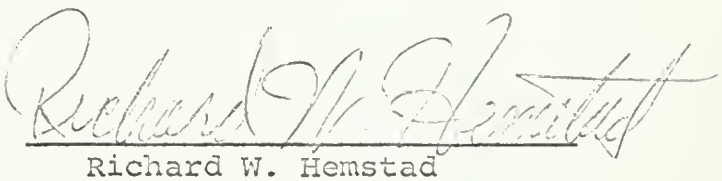
McNEALY & MERDES

BY: Edward A. Merdes
Edward A. Merdes

VII.

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



Richard W. Hemstad

APPENDIX OF STATUTES

15 U.S.C. Sec. 1 (Sherman Act, Sec. 1)

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890. c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282."

15 U.S.C. Sec. 2 (Sherman Act, Sec. 2)

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282."

15 U.S.C. Sec. 13 (Clayton Act, Sec. 2, as amended by Robinson-Patman Act).

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: and provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or

merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time wherein in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."

* * *

"(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

15 U.S.C. Sec. 14 (Clayton Act, Sec. 3)

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or

discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Oct. 15, 1914, c. 323, § 3, 38 Stat. 731."

15 U.S.C. Sec. 15 (Clayton Act, Sec. 4)

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731."

15 U.S.C. Sec. 15b

"Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections. Oct. 15, 1914, c. 323, § 4B, as added July 7, 1955, c. 283, § 1, 69 Stat. 283."